

Editor's note: Reconsideration granted; affirmed as modified -- 96 IBLA 140 (March 11, 1987); Appealed -- dismissed upon agreement of parties, Civ.No. C-87-254-K (D. Wyo. Mar. 23, 1988) -- part of 10th Cir. settlement of Ark Land case No. 87-2790 (not an IBLA case).

ARK LAND CO.

IBLA 84-826

Decided December 10, 1985

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, dismissing objections to the readjustment of coal leases W-0146199 and W-0150169.

Affirmed, in part, set aside and remanded in part.

1. Coal Leases and Permits: Leases -- Coal Leases and Permits:
Readjustment

Notice of intent to readjust coal leases given to a lessee prior to expiration of the period allowed for readjustment is effective to permit readjustment, even though BLM does not provide the specific terms or conditions for readjustment until after the expiration of the period.

2. Coal Leases and Permits: Leases -- Coal Leases and Permits:
Readjustment

Coal leases issued prior to enactment of the Federal Coal Leasing Amendments Act of 1976 become, at readjustment, subject to the requirements of that Act and regulations promulgated pursuant to that Act.

3. Coal Leases and Permits: Leases -- Coal Leases and Permits:
Readjustment

A BLM decision to readjust the terms and conditions of a coal lease to include additional requirements will be affirmed where the requirements are mandated by statute or regulation, or are in accordance with proper administration of the public lands.

APPEARANCES: Brent L. Motchan, Esq., St. Louis, Missouri, Brian E. McGee, Esq., Denver, Colorado, for appellant; Lowell L. Madsen, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Ark Land Company (Ark) has appealed from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated July 16, 1984, which effected a readjustment of coal leases W-0146199 and W-0150169.

The record shows these coal leases were originally issued to a predecessor of Ark effective January 1, 1964. The leases cover lands located in sec. 22, T. 23 N., R. 81 W., and sec. 12, T. 23 N., R. 82 W., sixth principal meridian, Carbon County, Wyoming. The lease terms provided for readjustment at the end of the primary 20-year term, or on December 31, 1983, pursuant to section 3(d) of the leases and the Mineral Leasing Act (MLA), as amended, 30 U.S.C. § 207 (1982). By notice dated July 11, 1983 (over 5 months prior to the end of the 20-year period), BLM informed appellant that the terms and conditions of the leases would be readjusted under the provisions of 43 CFR 3451. BLM specified that "A notice containing the readjusted terms and conditions will be forwarded to you on or before July 8, 1985. The readjustments will become effective 60 days after your receipt of that notice." By notices dated October 21 and 25, 1983, BLM tendered the proposed terms and conditions of the readjusted leases, citing section 3(d) of the leases and regulations under 43 CFR 3451.2. The notices of proposed readjusted lease terms provided a 60-day period from the date of receipt for filing objections to the proposed terms. Appellant filed timely objections on December 23 and 27, 1983. BLM considered these objections and issued its July 16, 1984, decision readjusting the coal leases. In its decision BLM dismissed certain objections and modified the terms of the readjusted leases in response to others.

At the time of issuance of the original leases, section 7 of the MLA, 30 U.S.C. § 207 (1958), provided:

Leases shall be for indeterminate periods upon condition * * * that at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine unless otherwise provided by law at the time of the expiration of such periods.

Section 7 of the MLA was amended by section 6 of the Federal Coal Leasing Amendments Act of 1976 (FCLAA), 30 U.S.C. § 207(a) (1982), to read in pertinent part: "Such rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended."

In addition, section 3(d) of each lease specifically provides:

The lessor expressly reserves * * *:

* * * * *

(d) Readjustment of terms. The right reasonably to readjust and fix royalties payable hereafter and other terms

and conditions at the end of 20 years from the date hereof and thereafter at the end of each succeeding 20-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period.

Ark has appealed, asking this Board to vacate the BLM decision and remand the cases to BLM so that the leases may be continued under the terms and conditions of the 1964 leases for another 20-year period. It argues the Secretary is barred by statute and by the contractual provisions of the leases from readjusting the terms and conditions of the leases by the Secretary's failure to render a final decision with respect to the readjusted terms and conditions prior to the end of the initial 20-year period. It argues the provisions of FCLAA were intended to be prospective and were not intended to be applied to pre-FCLAA leases. It asserts the readjustment of a coal lease constitutes a continuation of the original lease, as amended pursuant to the readjusted terms and conditions, and that it does not effectuate the termination of the original lease and the issuance of a "new" lease between the parties. It submits that the abrogation of and failure to consider appellant's contractual rights during the readjustment process is arbitrary, capricious, and an abuse of discretion. Ark further argues the readjustment of the specific terms and conditions of the leases breaches its contractual rights, is factually unsupported, and is arbitrary, capricious, and an abuse of discretion.

[1] This Board has repeatedly addressed the central issues of the authority of BLM to readjust and the applicability of FCLAA and its implementing regulations to pre-FCLAA leases. In every instance we have recognized BLM's right to readjust is preserved if a lessee is notified of the intention to readjust prior to the deadline for doing so. Since the decision in *Rosebud Coal Sales Co., Inc. v. Andrus*, 667 F.2d 949 (10th Cir. 1982), reversing *California Portland Cement Co.*, 40 IBLA 339 (1979), the Department has consistently taken the position that notice of intention to readjust a coal lease prior to the end of the initial or subsequent term is sufficient to permit a later readjustment of the lease. The specific provisions of the readjusted lease may be submitted at a later date, even following the expiration of the term. 43 CFR 3451.1(c)(2); *Sunoco Energy Development Co.*, 84 IBLA 131 (1984); *Coastal States Energy Co.*, 81 IBLA 171 (1984); 1/ *Gulf Oil Corp.*, 73 IBLA 328 (1983); *Lone Star Steel Co.*, 71 IBLA 92 (1983); *Coastal States Energy Co.*, 70 IBLA 386 (1983); 2/ *Blackhawk Coal Co.*, 68 IBLA 96 (1982); *Lone Star Steel Co.*, 65 IBLA 147 (1982). 3/ Notice of intent to readjust was given

1/ Appeal pending, *Lone Star Steel v. Clark*, No. CIV 84-173-C (E.D. Okla., filed Mar. 26, 1984).

2/ Appeal pending, *Coastal States Energy Co. v. Watt*, No. C 83-07305 (D. Utah filed June 3, 1983).

On Aug. 2, 1985, the Court granted the Government motion for summary judgment on all issues except the matter of whether the imposition of a new royalty rate was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law." The District court held that the record did not contain a factual basis for summary judgment on this issue "either for the Secretary or Coastal States."

3/ See footnote 1.

5 months prior to the 20-year anniversary date of each Ark lease. Accordingly, BLM's notice was timely conformed to current Department regulations and satisfied the minimum requirements of law. Sunoco Energy Development Co., *supra*. See 43 CFR 3451.1(c)(2).

Ark asserts the Secretary is barred by contract from readjusting the lease. In Coastal States Energy Co., 81 IBLA at 173, we held that BLM may readjust coal leases in conformance with FCLAA and its implementing regulations. It also has the right to readjust a coal lease even though such adjustment is not pursuant to a specific statutory or regulatory mandate. See Coastal States Energy Co., 70 IBLA at 394. A lessee has no vested right to the indefinite continuation of existing lease terms, as the initial lease contains no limitation regarding contract terms subject to readjustment. To hold otherwise would negate the statutory right to readjust. Coastal States Energy Co., 81 IBLA at 173.

Ark's main arguments against the BLM readjustment of the lease terms ignore the great body of precedent established by the cases affirming similar readjustments of coal leases. We find no reason to overturn our conclusions in previous cases that the Secretary is not barred by statute or contract from making such coal lease adjustments. As we stated in Gulf Oil Corp., *supra* at 330-31:

The power to readjust extends to every term of a lease. The only limitation on this authority is that the Department must notify the lessee of its intent to readjust the lease prior to the end of each 20-year period succeeding the date of the last readjustment, unless otherwise provided by law at the time of the expiration of such period. By accepting a lease containing this provision, the lessee has agreed that the Government, upon timely notice of readjustment, may readjust any term of the lease consistent with the law in effect, not at the time the lease issued, but when it is ripe for readjustment. Therefore, a lessee has no vested right to continue tenure under original lease conditions; to hold otherwise would totally negate this statutory reservation of the authority to readjust those terms and conditions. Thus, in the absence of a showing that a readjusted term is inconsistent with any statutory provision in effect on the readjustment date, there can be no merit to any argument that a readjustment decision affects any vested property right. On the contrary, it is the vested right of the United States as lessor and proprietor to readjust the terms.

[2] Ark contends that Congress intended the provisions of FCLAA to be prospective and that the FCLAA provisions cannot be applied to pre-FCLAA leases. This Board has also rejected this contention. Consolidation Coal Co., 86 IBLA 60 (1985); Sunoco Energy Development Co., *supra* at 132-33; Mid-Continent Coal & Coke Co., 83 IBLA 56, 64 (1984); Coastal States Energy Co., 81 IBLA at 173; see also Solicitor's Opinion, 88 I.D. 1003 (1981). In Coastal States Energy Co., 70 IBLA at 390-91, we stated:

That general lease language cannot serve to negate the statutory authority of the Secretary to readjust lease terms and conditions. Regulations in effect at the time of readjustment are applicable to leases subject to readjustment. Coastal would have us believe that only regulations in effect at the time its leases were issued govern the readjustment process. This is clearly incorrect. Just as the statute authorizes readjustment of terms and conditions, so too may the procedures for implementation be adjusted. Those procedures were revised pursuant to FCLAA. We find no ban to applying those regulations to readjustment to Coastal's leases.

Accordingly, the FCLAA readjustment provisions are applicable to pre-FCLAA coal leases.

We also find no merit to the argument that the readjustment of a coal lease constitutes a continuation of the original lease, and that readjustment does not effectuate termination and the issuance of a "new" lease. Ark submits the "failure to consider lessee's current contractual rights pursuant to the readjustment process is arbitrary, capricious and abuse of discretion." In rejecting this same argument in Coastal States Energy Co., 70 IBLA at 391, we stated: "Regardless of whether readjustment creates a new lease or merely adjusts terms and conditions, the same requirements exist." In addition, the Solicitor's Opinion, *supra*, specifically addresses this contention. Readjustment of a pre-FCLAA lease after the enactment of FCLAA is "like issuance of a new lease, an event which the FCLAA governs. Lease readjustment is like a lease renewal accompanied by a revision of lease terms. The exercise of an option to 'renew' a contract for a further term is generally held to produce a new contract." *Id.* at 1008 (footnote omitted). BLM's readjustment was contemplated in the original leases and the readjustment process was in accordance with law and, therefore, was not arbitrary, capricious, and an abuse of discretion.

[3] Ark's remaining arguments focus upon individual lease terms and repeatedly pose the question whether the readjustment breaches Ark's contractual rights, is factually unsupported, and/or is arbitrary, capricious, or an abuse of discretion. With respect to contract rights, this Board held in Mid-Continent Coal & Coke Co., *supra* at 65, that the lessee of a pre-FCLAA lease has no vested rights to the indefinite continuation of existing lease terms, since the original agreement specifically provided that all the terms and conditions were made subject to periodic readjustment. Moreover, the Court of Appeals in Rosebud noted the scope or nature of the changes that BLM could impose was not limited to specific statutory provisions. The Secretary retained a very broad power to make changes considered by him to be in accordance with the proper administration of the lands. 667 F.2d at 951. Consistent with this holding, on several occasions this Board has stated that a decision by BLM to readjust a coal lease will be affirmed where the readjusted provisions are mandated by statute or regulation, or where such provisions are in accordance with the proper administration of the public lands. Mid-Continent Coal & Coke Co., *supra* at 59, and cases cited therein.

We turn next to the specific objections to provisions of the readjusted coal leases. Ark objects to the use of the proposed lease form, stating "it is patently unreasonable to impose boilerplate terms and conditions which are otherwise utilized pursuant to the issuance of 'new' Federal coal leases" (Statement of Reasons at 58). In Consolidation Coal Co., *supra*, we specifically found it to be reasonable and justified for BLM to employ a standard form for coal lease readjustments. We stated the proposed form provides space for insertion of terms specifically applicable to the lease in question. For instance, sections 4, 5, and 6 of the lease forms used in readjustment provide for the insertion of particular bond requirements, rentals, and production royalties. *Id.* at 66. Therefore, we find this contention to be without merit.

Ark next complains the "effective date" should not be arbitrarily imposed. Ark submits that the readjusted terms and conditions cannot be imposed until either a final decision has been issued, or the conclusion of the review process by the Attorney General, or the completion of appeals from the readjustment process, whichever is later. We have also previously rejected this argument. See Consolidation Coal Co., *supra* at 66; Sunoco Energy Development Co., *supra* at 133-34; Gulf Oil Corp., *supra* at 334. 43 CFR 3451.2(c) provides, in part, "[t]he readjusted lease terms shall become effective either 60 days after the lessee is notified of them, or if the Attorney General desires to review the readjustment 30 days after the authorized officer transmits the required information to the Attorney General, whichever is later."

Ark asserts the statutes and regulations contained in section 1 of the readjusted lease provide that the lease may be subject to more extensive statutory and regulatory provisions than existed upon the date of its issuance. Ark specifically states:

[T]his provision [section 1] provides that the Leases would be subject not only to all (not necessarily reasonable) regulations of the Secretary which are currently in force, but, also, to all regulations hereafter in force. The effect of this provision is to reduce the Leases to no more than "agreements to agree" or "agreements to reagree." [Emphasis in original.]

(Statement of Reasons at 60). This Board has previously found the adoption of section 1 and similarly worded provisions which subject the lease to future regulations pertaining to coal leases to be within the scope of authority of the Secretary. Consolidation Coal Co., *supra* at 67. Sunoco Energy Development Co., *supra* at 134; Mid-Continent Coal & Coke Co., 83 IBLA at 60. In these cases we addressed the argument that section 1 of the standard readjusted lease terms required a lessee "to agree in advance to presently unknown terms embodied in future regulations." In Lone Star Steel Co., 77 IBLA 96, 97-98 (1983), the Board discussed two independent points relating to this argument. First, we noted the complaint was largely conjectural since injury to a lessee would depend upon the regulatory change adversely affecting appellant. Second, by way of dicta, the Board expounded on the reason for language in section 1:

[T]here are many forms of new, revised or amended regulations which might legitimately be applied to appellant's lease during the future, some which conceivably could work to the lessee's advantage, or at least not adversely affect it. Regulations can define terms, designate forms, or establish procedures. Other regulations may be necessary to implement new legislation concerning environmental protection, national emergency measures, or matters of health and safety, which could be made obligatory on the lessee in any event. Thus, the language of section 1 is not per se unlawful. Further, when new or revised regulations are promulgated, the Department must adhere to administrative procedures found in 5 U.S.C. § 553 (1976), which afford interested parties the opportunity to become involved in the rulemaking process. If such regulations are applied to the lease and appellant feels that its rights have been adversely affected, it may then have a right to appeal to this Board for relief.

Id. at 97-98. Therefore, we reject Ark's objections to the language contained in section 1 in the readjusted leases.

Ark asserts that section 2 of the readjusted leases represents a significant change from the original provisions of the leases because section 2 of the readjusted leases has eliminated appellant's right to manufacture coke or other coal products on the leased premises and their right to use the lands for the housing and welfare of employees. Ark requests restoration of these rights (Statement of Reasons at 62). This argument again fails to recognize the fundamental readjustment authority expressly contained in the 1964 leases. 30 U.S.C. § 207(a) (1982); Consolidation Coal Co., supra at 67; Rosebud Sales Co. v. Andrus, supra at 951; Coastal States Energy Co., 81 IBLA at 173; Gulf Oil Corp., supra at 331.

Ark objects to section 3 of the readjusted leases which provides for diligent development of the leased lands (Statement of Reasons at 63). It objects because the regulatory definitions of "diligent development" and "continued operation" are deemed by Ark to be inconsistent with the statutory mandate of 30 U.S.C. § 207(a) (1982) that coal leases must produce "in commercial quantities at the end of ten years" or be terminated. Ark contends that, to comply with the Act, it should be sufficient for a lessee to commence production at the end of the 10-year period, rather than to have achieved production of commercial quantities by that date. This Board considered this exact question in Coastal States Energy Co., 70 IBLA 386, and Sunoco Energy Development Co., supra at 134. On January 1, 1984, the terms "diligent development" and "continued operation" were defined by regulations codified at 43 CFR 3480.0-5(a)(8) and (12) (1983). Since the regulations require production to be "not less than commercial quantities" both the applicability and intent of the regulations are clear and may not be disregarded. See Coastal States Energy Co., 70 IBLA at 392. Therefore, the diligence requirements, as mandated by regulation, must be included in the readjusted leases. Spring Creek Coal Co., 83 IBLA 159 (1984); Mid-Continent Coal & Coke Co., supra at 59; Gulf Oil Corp., supra at 331.

Ark challenges the bonding requirements contained in section 4 of the readjusted leases, contending the \$ 60,000 bond requirement for W-0146199 and the \$ 5,000 bond requirement for W-0150169 are "inordinate." Ark asserts the bond amounts (which were based on unpublished inhouse guidelines) "are factually unsupported, are patently unreasonable and are therefore arbitrary, capricious and an abuse of discretion" (Statement of Reasons at 66).

In its July 1984 decision, BLM confirmed the bond amounts were set in accordance with Minerals Management Service (now BLM) guidelines. These guidelines require a bond sufficient to cover 3 months of estimated production and 1-year's rental. neither the statute nor Departmental regulations provide a specific formula for computing the amount of a bond. however, 43 CFR 3400.0-5(s) provides a "lease bond," required by 43 CFR 3474.1, shall mean

the bond or equivalent security given the Department to assure payment of all obligations under a lease, exploration license, or license to mine, and to assure that all aspects of the mining operation other than reclamation operations under a permit on a lease are conducted in conformity with the approved mining or exploration plan. [Emphasis added.]

Ark has provided no evidence the amount of the bond set for these leases was greater than is required to accomplish the above-stated regulatory purposes. Coastal States Energy Co., *supra* at 175; *see Cambridge Mining Co.*, 74 IBLA 26 (1983). Accordingly, we conclude appellant has not proven that BLM improperly determined the amount of the lease bonds.

Ark next objects to the language in section 5 of the readjusted leases. This section requires payment of an annual rental of \$ 3 per acre, which may not be credited against royalties. Section 5 is specifically mandated by 43 CFR 3473.3-1(a), which provides "[t]he annual rental per acre or fraction thereof on any lease issued or readjusted after the promulgation of this subpart shall not be less than \$ 3." Ark's objections to these provisions also have been considered and rejected by the Board in Consolidation Coal Co., *supra* at 68; Mid-Continental Coal & Coke Co., *supra* at 62, and Coastal States Energy Co., 81 IBLA at 175. BLM properly imposed the \$ 3 per acre rental.

Ark objects to the language of section 6 of the readjusted leases which calls for a production royalty of 12-1/2 percent of the value of coal produced by strip or auger mining methods, and 8 percent of the value of coal produced by underground methods. Ark's 1964 leases called for a royalty of \$ 0.15 per ton for underground coal and \$ 0.175 per ton for surface coal payable quarterly. Based on its earlier argument that FCLAA does not apply to pre-FCLAA leases Ark contends the 12-1/2 percent and 8 percent rates do not apply to their lease, and the royalty rates are arbitrary, capricious, and an abuse of discretion.

The Board responded to similar contentions in Blackhawk Coal Co., *supra* at 99, where we stated:

Departmental regulation 43 CFR 3473.3-2 provides two ways of granting underground coal lessees relief from the statutory 12-1/2 percent royalty. Subsections (a)(1) and (a)(3) implement 30 U.S.C. § 207(a) (1976) and provide that a rate as low as 5 percent may be determined at lease issuance. Alternatively, the Department may establish a royalty rate in the lease and provide relief after lease issuance upon application of the lessee under subsection (d), which implements 30 U.S.C. § 209 (1976). Appellant has not persuaded us that it is unreasonable to establish an 8 percent royalty rate in the lease now, since the rate may temporarily be reduced later if conditions warrant. If a lower rate is put into the lease now and economic conditions change favorably during the term of the lease, there will be no opportunity for upward adjustment of the royalty figure until the lease is again ripe for readjustment. The method chosen by BLM thus assures the United States a fairer return over the life of leases, provides appellant some relief from the statutory 12-1/2 percent rate, yet affords appellant an opportunity for further royalty relief when it is really needed. We previously have affirmed BLM decisions denying special royalty relief at lease readjustment, requiring lessees to seek such relief under 43 CFR 3473.3-2(d). Lone Star Steel Co., 65 IBLA 147 (1982); Garland Coal and Mining Co., 49 IBLA 400 (1980).

See also FMC Corp., 74 IBLA 389, 392-93 (1983) (reversed in part, FMC Wyoming Corp. v. Watt, see below) and Coastal States Energy Co., 70 IBLA at 393.

As in Blackhawk, we affirm BLM's authority to readjust Ark's production royalty. We find specifically that the Secretary has the right to apply FCLAA royalty provisions to pre-FCLAA leases. We are, however, aware of the decision by the United States District Court for Wyoming styled FMC Wyoming Corp. v. Watt, C 83-347-K (June 29, 1984). In that case the Court held, with reference to surface mining operations, the Department could not apply the statutory mandated rate of 12-1/2 percent to all leases subject to readjustment, and that the applicable royalty rate must be individually tailored to each lease. ^{4/} The Department has appealed that case to the Court of Appeals for the 10th Circuit under docket number 84-2175 (Aug. 29, 1984). Under the circumstances, and considering the recent Utah Federal District Court refusal to grant summary judgment on this issue in Coastal States Energy v. Watt, supra at n.1, we deem it advisable to remand this matter to BLM pending a final decision in the FMC Wyoming Corporation appeal. Following the decision BLM should issue a decision applying a royalty rate in conformance with the court determination.

^{4/} The mine was a special bituminous mine where the costs of extraction increased over the life of the mine because of the dip of the coal seam. The Court points out that, under that classification, the mine is exempt from certain reclamation standards under the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 (1982). As such, it is one of only two mines in the entire United States to be so classified.

Ark also objects to sections 7 (advance royalty), 9 (exploration plan), 10 (mining plan), 11 (logical mining units), 14 (authorization of other uses and disposition of leased lands), 17 (employment practices), 18 (monopoly and fair practices), 23 (readjustment of terms and conditions), and 26 (lessee's liability to lessor). Ark reiterates its previous assertions that these provisions violate their contractual rights and are arbitrary and capricious. As we have previously noted, a lessee has no vested rights to the indefinite continuation of existing lease terms. Coastal States Energy Co., 81 IBLA at 173. We reaffirm our rejection of these same objections in Consolidation Coal Co., supra at 70, where we held the appellant had no such contract rights, nor are the provisions arbitrary and capricious.

Ark's final objection involves the language in section 30 of the readjusted leases, which includes two special stipulations. Special stipulation (a) relates to cultural resources and special stipulation (b) to paleontological resources. Neither stipulation has been shown to be in conflict with use of the leased lands and, in similar instances, these stipulations have been found to be acceptable. Sunoco Energy Development Co., supra at 138.

First, Ark finds these stipulations to represent new lease terms and argues they are not subject to readjustment. We have previously addressed this argument. Appellants object to the use of the terms "mine plan area" and "exploration plan area" as in special stipulation (a), claiming the language to be overly broad. It argues that any cultural-resource-intensive field inventory should be limited to those lease areas which will be adversely affected by lease-related activities. However, we find the stipulation to be reasonable. Ark has the right to define the areas in its mine and exploration plans. Any question relating to the application of stipulation (a) to a particular area covered by a mine or exploration plan should be addressed at the time the plan is submitted.

Under stipulation (b) the lessee must notify the Government upon discovery of any larger and more conspicuous fossils that might be altered or destroyed by its operation. The lessee may continue to operate as long as the fossil "would not be seriously damaged or destroyed by the activity." The Government is required to evaluate such discoveries and within 5 working days notify the lessee of "what action shall be taken with respect to such discoveries." The cost of any required salvage is to be borne by the United States. Ark seeks a timeframe with respect to how long an operator would be required to suspend operations awaiting Government removal of a significant fossil.

Under the circumstances we do not find appellant's proposed solution of providing a specific timeframe to be appropriate. Clearly, imposing a specific time limitation in the stipulation would not be feasible, since removal would depend on a number of circumstances which would, necessarily, include the location of the fossil, its size, its condition, and many other factors which cannot be predicted in advance. However, it is implicit from the language of the stipulation that, if removal is deemed warranted, the Government would conduct any removal operation within a reasonable time, taking into consideration the imposition placed upon appellant's operations.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed with respect to all issues other than the royalty rate to be imposed. With respect to the royalty rate, the decision is set aside and remanded to BLM for issuance of a decision in accordance with the final decision in the matter now before the United States Court of Appeals for the 10th Circuit entitled FMC Wyoming Corp. v. Clark, Civ. No. 84-2175, at such time as a final decision is issued.

R. W. Mullen
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Will A. Irwin
Administrative Judge

